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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

NO. _____

CLAUDE DAVIS BALLEW,
*Petitioner,*

v.

STATE OF ALABAMA,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA**

The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Alabama entered in the above case on May 9, 1974.

## OPINION BELOW

The Opinion of the Supreme Court of Alabama is appended hereto as Appendix A.

## JURISDICTION

The judgment of the Supreme Court of Alabama was entered on May 9, 1974. Mr. Justice Powell of this Court granted to Petitioner an extension to November 3, 1974 within which to file this Petition. This Court's jurisdiction is invoked under *Title 28 U.S.C.*§ 1257(3).

## QUESTIONS PRESENTED

1. Whether the provisions of Title 14, Section 374, Code of Alabama, on its face and as construed and applied to authorize the judgments of conviction of Petitioner herein, were, prior to June 21, 1973, unconstitutionally vague, violating the First, Fifth and Fourteenth Amendments, because:

(a) The statute concededly does not contain a description of the specific sexual conduct *Miller v. California*, 413 U. S. 15, held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary, terminology into the statute;

(b) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films offend national standards, which nationwide standards this Court held were unascertainable, unprobable and non-existent;

(c) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged

publications and films appeal to the prurient interest of the average person in the Nation as a whole, which test this Court labelled "unrealistic';

(d) Prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications and films were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous";

2. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, under a standard for judging *scienter* solely by alleged proof of a general knowledge of the nature of the materials involved, and without competent evidence to establish even that Petitioner had such knowledge, abridge the freedoms of speech and press and arbitrarily deprive Petitioner of his liberty and property without due process of law, in violation of the First, Fifth and Fourteenth Amendments. ,

3. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein where the Indictment, trial and convictions of Petitioner were concededly governed only by the standards for judging obscenity enunciated in *Memoirs v. Massachusetts,* 383 U. S. 413, and where the Government presented no evidence that the publications and films exceeded national community standards or were utterly without redeeming social value, and where the undisputed record established that the materials did not exceed national community standards and had educational and other social value, violate the free speech and press and due process provisions of the First, Fifth, and Fourteenth Amendments.

4. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications named in the Indictment are not obscene and are entitled to constitutional protection as a matter of law, violate the free speech and press and due process provisions of the First, Fifth and Fourteenth Amendments.

(e) The statute permits aprior restraint on free speech and forces one to become a self-censor, a result this Court forbade in *Near v. Minnesota*, 283 U. S. 607 and *Carroll v. Comm'rs of Princess Anne*, 393 U. S. 175;

(f) The section constituting the prior restraint is inseparable from the rest of the statute.

5. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications, although constitutionally protected in fact and in law under the *Memoirs* test, were nevertheless held obscene under the *Miller* test by the Supreme Court, abridge the exercise of freedoms of speech and press, arbitrarily deprive Petitioner of his liberty without due process of law and constitute an *ex post facto* and retroactive unforeseen judicial construction of the provisions of the statute, all in violation of the guarantees of the First, Fifth and Fourteenth Amendments and Article I, § 9.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth. Eighth and Fourteenth Amendments, and Article I, §9 of the Constitution, and thy pertinent provisions of Title 14, Section 374, Code of Alabama, appear in Appendix B hereto.

## STATEMENT

1. The Petitioner was charged by Indictment that he:

> did knowingly and unlawfully sell to Don Smitherman, who was over 18 years of age, a magazine entitled 'Penelope, Issue No. 1' containing pictures and photographs of the female human body depicting the female genitals in such a manner as to be obscene or to represent hard-core pornography, after said Claude Davis Ballew had been notified in writing by an Assistant Attorney General of the State of Alabama, pursuant to Act Number 698, Acts of Alabama, Regular Session 1969, that there was reasonable cause to believe that said magazine was obscene and hard-core pornography against the peace and dignity of the State of Alabama."

The verdict of the Jury was rendered on June 16, 1971, the Petitioner being found guilty. He was sentenced to one year at hard labor and assessed a fine of $500.00.

2. At each stage of the proceedings against him, Petitioner challenged the validity of the Indictments, the standards used at trial, and the evidence proferred by the State. He continually asserted the non-obscenity of the publications involved.

3. On June 29, 1973, the Alabama Court of Criminal Appeals affirmed the conviction without opinion, and also denied an application for rehearing on July 26, 1973.

4. On May 9, 1974, the Supreme Court of Alabama, upon a Petition for a Writ of Certiorari, affirmed the conviction. The Court, looking at the 1961 Act under which the magazine was declared obscene, held, *inter alia,* that:

(a) The statute, other than section 374 (16M) was clear, unambiguous and constitutional

(b) Section 374 (16M) could be severed from the rest of the statute

(c) Petitioner's *ex post facto* arguments were disposed by the holding of this Court in *Frank v. Mangum,* 237 U. S. 309

(d) the statute conforms to *Miller v. California,* 413 U. S. 15

5. The Supreme Court denied an Application for Rehearing on June 6, 1974.

## REASONS FOR GRANTING THE WRIT

1. State law as written or authoritatively construed, under which obscene materials are regulated, must comply with the First Amendment standards set forth in *Miller v. California,* 413 U. S. 15, Title 14, Section 374, Code of Alabama as it was written at the time Petitioner was arrested, tried and convicted in these cases, did not comply with the

standards set by *Miller*. Nor has that ordinance been "authoritatively construed" to include the *Miller* safeguards. *Miller* says that State statutes which regulate obscene material must be carefully limited. And,

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable State law, as written or authoritatively construed. A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value."

And further, that,

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard-core" sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Miller v. California*, supra.

Title 14, Section 374(3), Code of Alabama provides that:

> " 'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest."

Nowhere does this statute regulate the depicting or describing of sexual conduct as required by *Miller*, supra. Nor has this statute ever been "authoritatively construed" to regulate only that specific depiction or description of sexual conduct. For this reason, Title 14, Section 374, Code of Alabama, at the time Petitioner was arrested, tried and convicted, was unconstitutional since it failed to comply with the constitutional standards set out in *Miller v. California.*

Perhaps it can be argued that Title 14, Section 374, Code of Alabama was constitutional in light of the law at the time the Petitioner was arrested. In 1970, perhaps it was constitutional. Now, post-*Miller*, it is not. In *Visual Educators, Inc. v. Koeppell*, 268 So. 2d, 22 (1972), the Alabama Supreme Court followed the decisions of this Court in incorporating the *Memoirs* requirements in the application of the State statute in order to make it valid. However, this Court has now abandoned *Memoirs v. Massachusetts*, 383 U. S. 413, (1966), and its tests, in particular the test of "utterly without redeeming social value." However, no member of this Court today supports the *Memoirs* formulation. Without the *Memoirs* test to rely on, Title 14, Section 374 is without support and therefore becomes impermissibly vague for the reasons set out above.

It is the position of Petitioner that the statute under which he has been charged is void for vagueness in that no criteria are set forth as would give fair notice of the precise standards of criminality before the commission of the alleged offense. *Watkins v. U. S.*, 354 U. S. 178, 208 (1957).

In *Miller v. California*, 413 U. S. 15, this Court promulgated a new constitutional standard for determining obscenity. Mr. Chief Justice Burger stated that:

"We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., vs. Dallas, supra, 390 U. S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

Further, Mr. Chief Justice Burger stated that:

"Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U. S. at 491-492 (1957)."

*Miller v. California,* supra, is the key case in which this Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the First Amendment. It is obvious that this Court undertook to formulate standards more concrete than those that have ever been in the past. The sharpness of the break with *Roth* when

this Court handed down *Memoirs v. Massachusetts*, 383 U. S. 413 (1966) was not nearly so great as the break with *Memoirs* that was handed down by this Court in *Miller v. California*, supra, as far as specifically designating prohibited material is concerned. This Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and this Court confined the permissible scope of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

Clearly, if the provisions of the State statute are limited to press materials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically defined in writing by the State, or if specific hard core sexual conduct has been read into the statute by authoritative judicial construction, the present statute under attack is not sufficient to regulate those works depicting and describing that conduct.

It should now be necessary for the Alabama Legislature to create legislation anew, adopting, if they desire, the test suggested in *Miller* so that in the future any elaborations or constructions of the *Miller* test can be left to the Courts. Before the appellate courts can so construe, there must exist a constitutionally permissible statute with which to work. The present Alabama statute cannot be authoritatively construed to meet the *Miller* test of specificity.

Any case, criminal or civil, pending trial or appellate review, based on the present statute which clearly does not contain the *Miller* test of specificity, should be set aside. It is clear that any attempt at authoritative judicial construction

by the appellate courts of Alabama incorporating the *Miller* test must fail at this juncture because the statute as written fails to give any person fair notice that criminal liability is dependent upon a new Supreme Court suggested test that only legal researchers could appreciate at the point in time when the conduct occurred.

This Court's per curiam opinion in *Rabe v. Washington,* 405 U. S. 313 (1972) clearly indicated that the application of a statute in this manner would violate one's right to Due Process of Law. Engrafting *Miller* standards into the statute as written or as might be subsequently construed by authoritative judicial construction punishes one for conduct that was not criminal at the time it is committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. There is just no doubt that the constitutional requirement of definitiveness is violated by the Alabama statute because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. No one should be held criminally responsible for conduct which he could not reasonably understand to be proscribed at the time he engaged in the conduct.

Just recently this Court reiterated that "(i)t is a basic principle of Due Process that an enactment is void for vagueness if its prohibitions are not clearly defined."

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give

> the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Grayned v. City of Rockford, 408 U. S. 104, 109-109 (1972).

2. The Petitioner is condemned by the Alabama Courts to spend one year at hard labor and to pay a $500.00 fine for selling publications he could not know were legally obscene at the time he sold them, and which under the *Roth-Memoirs* test, which the Supreme Court of Alabama acknowledged to be controlling in its decision in *Visual Educators, Inc. v. Koeppell*, 268 So. 2d 22 (September 28, 1972), and under the *Redrup* application by this Court in summarily reversing 31 similar cases, he had a right to believe and expect would ultimately be found not to be legally obscene by this Court. This Court in *Miller* changed the operative obscenity law and set forth "freshly written standards defining obscenity which until (that) decision, were never the part of any law." Now, the Supreme Court of Alabama has "specifically imcorporate(d) the *Miller* guidelines or tests . . . into its construction of the word 'obscene' in Section 374 (3) of Title 14, Alabama Code of 1940, as amended, Recompiled 1958,

(Supp. 1971), which until its May 9, 1974, decision in this case could not have been part of the law of Alabama.

For that Court to conclude that it has *heretofore* construed Section 374 (4) to contain the *Miller* requirement for specificity by its decision in *McKinney v. State*, 287 Ala. 648, is to misconstrue what this Court intended in its *Miller* and related decisions. Rather than *McKinney I*, the Petitioner had a right to rely on the Alabama Supreme Court's pronouncements in *Visual Educators, Inc. v. Koeppell*, supra, rendered ten months after *McKinney I*, in which it set forth the "three elements (which) must be satisfied independently in order to find that the material in question is obscene.

> "It must be established that: '(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description of representation of sexual matters; and (c) the material in utterly without redeeming social value' . . . If any one or more of the above-mentioned elements is found to be lacking, the material cannot be found to be obscene.
>
> * * * * *
>
> "It should also be noted that the 'contemporary community standards' referred to in the '*Roth* test' are national in scope, rather than local or state standards."

Chief Justice Burger, in *Miller*, recognized what this Petitioner understood with reference to the materials he was selling:

> "*Memoirs* required that to prove obscenity, it must be affirmatively established that the material is 'utterly without redeeming social value'—a *burden virtually impossible to discharge under our criminal standards of proof.*" (Emphasis supplied).

The Petitioner certainly had the right to rely on the fact that 31 cases involving materials similar in nature to the materials sold by him in this case were summarily reversed by this Court *Per Curiam, Redrup v. U. S.* In each of the 31 cases reviewed by this Court, the Defendant had been found guilty of selling one or more allegedly obscene publications. His conviction had been upheld by either the highest State court or Federal Circuit Court. This Court, in reversing those decisions, was telling him and others similarly situated that what he was selling was protected materials under the First Amendment to the United States Constitution. As eloquently pointed out by Justice Jones' dissent in *McKinney v. City of Birmingham,* ____ Ala. ____, So. 2d (m.s. S.C. 484 and S.C. 485-May 9, 1974), he also had or should have the safeguards afforded him by Article I, Section 4, of the Alabama Constitution.

For the Alabama Supreme Court to judicially engraft the *Miller* standards onto Section 374 (3) and Section 384 (4) would be to make meaningless the protection attempted to be afforded this Petitioner by Chief Justice Burger when he wrote:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive (hard-core) sexual conduct specifically defined by the regulating State

> law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

It is unthinkable that the five Justices of this Court who agreed to change the standards for determining obscenity intended that the various State courts would make criminal that which was not criminal before.

Many jurisdictions, including those of Florida, Tennessee, Louisiana, Indiana, Iowa, Arkansas, and just recently, Massachusetts, among others, have had their *McKinney I* cases and statutes with a definition of obscenity such as found in Section 374 (3), but their courts have refused to re-draft their obscenity statutes. The primary reason given is that to do so would amount to a denial of due process due to lack of adequate notice.

We respectfully submit that the Supreme Court of Alabama certainly has the right to judicially engraft the *Miller* standards onto Section 374 (3) and Section 384 (4), but that its application should be prospective and not retroactive.

3. The Court's failure to strike down the applicable statute as being vague will permit an unforeseeable judicial enlargement of the criminal statute before it, which will be applied retroactively, and which will operate precisely like an *ex post facto* law. All those actions done before this Court's announcement of new standards and which were done innocently under the old standards can now become criminal acts and punishable by judicial fiat. The Congress and the

States are barred by the *ex post facto* clause of the Constitution from passing laws of this nature and surely the Supreme Court of Alabama and the various trial courts must be barred by the Due Process clause from achieving precisely the same results by judicial construction.

It is axiomatic that any criminal statute must give fair warning of the conduct that it makes a crime. *United States v. Harriss*, 374 U. S. 612,617.

The Due Process clause of the *Constitution* requires that a Court strike down a criminal statute where it was not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connolly v. General Construction Co., 269 U. S. 385,391.*

This Court has often recognized that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of Due Process of Law, and that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U. S. 451,453. See also: *Rabe v. State of Washington*, 405 U.S. 313 (1972). *Wright v. State of Georgia*, 373 U. S. 284 (1963). *Palmer v. City of Euclid*, 402 U. S. 544 (1971). *Papachristou v. City of Jacksonville*, 405 U. S. 156 (1972).

If the principles promulgated by this Court in approximately sixty-eight (68) judgments rendered on June 21

and June 25, 1973 were to be applied to Petitioner herein for alleged conduct said to be violative of the statute at a time during 1970, it would thus be violative of the Due Process clause and *Ex Post Facto* clause of Article I, Section 9 and 10, of the *United States Constitution*, because the State would be punishing Petitioner for conduct not criminal at the time he committed it, in that the said criminal statute did not give fair warning of the conduct which it prohibits, and the standards to be applied.

An *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action", or "that *aggravates* a *crime*, or makes it *greater* than it was, when committed." *Calder v. Bull*, 3 Dall. 386, 390 (emphasis supplied).

This Court has said that "no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time." *Kring v. Missouri*, 107 U. S. 221,235.

Until such time as the State of Alabama enacts new legislation specifically defining prohibited "hard-core" sexual conduct, or until such time as the Supreme Court of Alabama authoritatively construes the statute to specifically define hard-core sexual conduct, to thus give fair notice to future defendants, there is no Constitutionally permissible statute regulating obscenity.

4. *Title 14, Section 374, Code of Alabama* and the Complaints filed against the Petitioner do not clarify what

meaning is attributed to the word "knowingly", nor was "guilty knowledge" proved at the trial. The statute and the Complaints were required to set forth precisely the degree of "guilty knowledge" that a Defendant is required to defend against. Moreover, as we demonstrate hereinafter, actual "guilty knowledge" of the nature, contents, and character of the material is constitutionally required. See *Hamling v. United States*, ____ U. S. ____, 41 L.Ed.2d 590 (1974).

In *Smith v. California*, 361 U. S. 147 (1959), this Court held that the strict liability feature of the California obscenity law was unconstitutional. The tendency of the California ordinance, the Supreme Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U. S. 160.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of proof of knowledge of contents is to attempt indirectly to impose the absolute criminal liability which was condemned by the Court in *Smith v. California*, supra. Sex is not synonymous with obscenity, and knowledge of the contents of a writing dealing with sex does not meet the tri-partite knowledge requirements of *Hamling, supra*. Mere proof that a publisher, landlord, or distributor knows that he distributes "Tropic of Cancer", "Lady Chatterley's Lover", "Fanny Hill", "Pleasure is My Business", "Lust Pool", "Shame Agent", "Sin Hooked", "Lust Job", "Sex Life of a Cop", "Solis", etc. in no way establishes, it is submitted, that such publisher or distributor knows the nature, character and contents of those

publications. The decision of this Court make this abundantly clear. It is likewise clear that the statute in question herein permits such a strict liability. And the problem is further compounded by the statute's and the court's preclusion of the petitioner from defending on the issue of obscenity *vel non* at all.

Mr. Justice Rehnquist has defined the requisite criminal knowledge for obscenity convictions: "It is constitutionally sufficient that the prosecution show that a defendant *had knowledge* of the contents of the materials he distributes, *and* that he *knew* the character *and* nature of the materials". *Hamling v. United States,* ____ U. S. ____, 41 L.Ed.2d 590 (1974) (emphasis supplied). Even though knowledge of a material's legally obscene status is not required, and thus traditional *scienter* is not required for the class of speech crimes *qua* obscenity crimes (see *Hamling* and *Smith, supra*), *actual* knowledge of the contents, nature, and character of the material *is* required for conviction. From *Roth v. United States,* 354 U. S. 476 (1957), through *Memoirs v. Massachusetts,* 383 U. S. 413 (1966), to *Miller v. California,* 413 U. S. 15 (1973), this Court has been attempting to define what is "obscene' and whether or not the obscenity laws, state or federal, give an accused adequate notice of what is proscribed. If nothing else, seventeen (17) years of constitutional adjudication have indicated that the laws of this country, and its courts, have been somewhat confused. If actual knowledge of the contents, nature, and character of materials is required for a conviction of the substantive offense, then at least that actual knowledge must be *found* before one can be found guilty of violating the law. Thus, the mere showing of a "managership", possession or sale without

proof of actual knowledge of the nature, character, and contents of materials is insufficient as a matter of constitutional law to uphold the convictions herein.

*First Amendment* rights have the highest standards of protection in the American system of jurisprudence, and those rights may only be disturbed when there exists a demanding, overriding, and compelling state interest, and even then such incursions are to be severely limited. *Dombroski v. Pfister,* 380 U. S. 479; *Keyishian v. Board of Regents of New York,* 385 U. S. 589; *DeJonge v. Oregon,* 299 U. S. 353. If speech is to be regulated at all, such regulation is to be narrowly drawn so as not to impinge on rights that are properly beyond the sphere of that narrowly conceived area of governmental regulation. *NAACP v. Button,* 371 U. S. 415; *Shelton v. Tucker,* 364 U. S. 479. Where statutes on their face or as applied are vague and overbroad, then the chilling effect *Dombroski* warns of rears its ugly head.

There is a lack of Due Process of Law and fundamental fairness when persons cannot be adequately forewarned that their presumptively unlawful activities might someday be used against them in a criminal prosecution. People tend to steer far away from activity that might later be termed "dealing in obscenity" and the chilling effect on protected activity becomes clear. *Speiser v. Randall,* 357 U. S. 513; *NAACP v. Button,* 371 U. S. 415.

In order to avoid self-censorship and a chilling effect on *First Amendment* freedoms, see *Smith v. California,* 361 U. S. 147; *Dombrowski v. Pfister,* 380 U. S. 479, then it is necessary that convictions be based on a *knowing* violation of the law,

i.e., a *knowing* sale, distribution or possession with intent to disseminate of *obscene* material *with knowledge* of its contents, nature, and character. See *Hamling, supra.*

Statutes may regulate speech only with narrow specificity or else cherished *First Amendment* freedoms will suffer. Real or vague threats of prosecutions, whether they turn out to be successful or not, clearly deter people from the free exercise of those rights. "So long as the statute remains available to the State, the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombrowski, supra,* at 494. See, *NAACP v. Button,* 371 U. S. 415; *Keyishian v. Board of Regents of New York,* 385 U. S. 389; *Speiser v. Randall,* 357 U. S. 513; *Shelton v. Tucker,* 364 U. S. 479; *DeJonge v. Oregon,* 299 U. S. 353; *United States v. Baranski,* 484 F.2d 556 (CA-7 1973); *United States v. Dellinger,* 474 F.2d 340 (CA-7 1972); *United States v. Spock,* 416 F.2d 165 (CA-1 1969):

> "The area of proscribed conduct will be adequately defined and the deterrent effect of the statute contained within constitutional limits only by authoritative constructions sufficiently illuminating the contours of an otherwise *vague prohibition.* As we observed in Baggett v. Bullit, supra, this cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however

> expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others."

*Dombrowski, supra* at 490-494.

The obscenity statute here involved, Title 14, Section 374, Code of Alabama, purports to punish the knowing possession, sale, or distribution of obscene materials. It does not purport to punish the possession, sale or distribution of books or writings dealing with sex. *Scienter* means guilty knowledge. This means that the prosecution in any obscenity case must charge and prove that the Accused *knew* the contents, nature, and character of the material (see *Hamling, supra*), not merely that the Accused knew that the material dealt with sex.

There can be no question, it is submitted, if the obscenity statute is not to be unconstitutionally applied, that the Complaints must allege this knowledge. Without such allegations, the Complaints are fatally defective, and the convictions and the statute on which they are based as unconstitutional. See *Hamling v. United States*, ____ U. S. ____, 41 L.Ed.2d 590 (1974), and *Miller v. California*, 413 U. S. 15.

## CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of Alabama.

Respectfully submitted,

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## APPENDIX A

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THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1973-74

Ex parte: Claude Davis Ballew

Petition for Writ of Certiorari
to the Court of Criminal Appeals

(Re: Claude Davis Ballew
v.
State of Alabama)

S.C. 480

HARWOOD, JUSTICE

The appellant operated an "Adults Only" book store in Mobile. As a result of a sale of a magazine entitled "Penelope, Issue No. 1" he was indicted for selling hard-core pornography. His trial resulted in a verdict of guilty, the jury imposing a fine of $500.00. The court imposed an additional punishment of hard labor for Mobile County for one year.

The Court of Criminal Appeals affirmed the judgment without an opinion. The appellant duly petitioned this court for a writ of certiorari, and we granted the writ.

The indictment against this defendant reads:

> "The GRAND JURY of said County charge, that, before the finding of this indictment CLAUDE DAVIS BALLEW whose name is to the Grand Jury otherwise unknown than as stated, did knowingly and unlawfully sell to Don Smitherman, who was over 18

> years of age, a magazine entitled "Penelope, Issue No. 1' containing pictures and photographs of the female human body depicting the female genitals in such a manner as to be obscene or to represent hard-core pornography, after said Claude Davis Ballew had been notified in writing by an Assistant Attorney General of the State of Alabama, pursuant to Act Number 698, Acts of Alabama, Regular Session, 1969, that there was reasonable cause to believe that said magazine was obscene and hard-core pornography against the peace and dignity of the State of Alabama."

We do not consider it arguable but that the appellant was proceeded against under the provisions of Act No. 698, approved 10 September 1969. See 1969 Acts of Alabama, pps. 1253 through 1255. This Act now appears in the Recompiled Code of Alabama, 1958, Cumulative Pocket Part 1971, as Chapter 64C, Title 14, Sections 374(16j) through 374(16o), and for convenience will at times be so referred to hereinafter.

Section 374 (16j) contains specific definitions of words used in the Act, such as "nudity," "sexual conduct," "sado-masochistic abuse," "hard-core pornography," "obscene," etc. "Obscene" is defined as a description or representation in any form of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it, (1) Predominately appeals to the prurient, shameful, or morbid interest, and (2) is patently offensive to prevailing or contemporary standards in the adult community as a whole with respect to what is suitable material, and (3) is utterly without redeeming social value or importance.

Section 374(16k) makes the sale or loan to a person eighteen years of age or over, of any picture, photograph, drawing, magazine, pamphlet, etc., of a person, or portion of the human body, which depicts nudity, sexual conduct, or

sado-masochistic abuse and which is obscene or represents hard-core pornography.

Section 374(16m) reads:

"(a) No prosecution may be commenced against any person for violating sections 374(16k) and 374(16l) of this title unless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this chapter, and the accused has, after receiving such notice violated this chapter.

"(b) The written notice provided for in paragraph (a) of this section 374(16m) may be given by only the following officials; the state attorney general and any assistant attorney general; the district attorney, county solicitor, their assistants and deputies, or any person whose office and duty is to prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the department of public safety.

"(c) Any person receiving such written notice provided for in paragraph (a) of this section 374(16m) shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this chapter. (1969, p. 1254, § 4, appvd. Sept. 10, 1969.)"

Section 374(16o) provides that the provisions of Chapter 64c are cumulative of, and in addition to, all laws dealing

with obscene or hard-core pornography, and shall not be construed to repeal other laws on such matters.

In the trial below the State introduced in evidence the magazine entitled "Penelope, Issue No. 1." Additional evidence introduced by the State showed that the Mobile Book Mart is located on Conception Street in Mobile, Alabama. The front of the store had a sign reading "Adult Book Store" followed by the legend, "No one under twenty-one years of age admitted." The front window glasses were rendered opaque by being painted over. The Mobile Book Mart is operated by Clarence Cantey. On 13 May 1970, the premises were visited by Robert E. Morrow, an Assistant Attorney General. On display for sale was the magazine "Penelope, Issue No. 1," along with other magazines. After inspecting the magazines Mr. Morrow served a written notice on the appellant to the effect that he had reasonable cause to believe that certain magazines on display, including "Penelope, Issue No. 1" were obscene, and that continuing to offer the materials for sale constituted a violation of Act 698. The next day, Donal T. Smitherman, a 29 year old member of the Vice and Narcotics Squad of the Mobile Police Department, entered the store and purchased a copy of "Penelope, Issue No. 1" from the appellant who was in charge of the store as manager.

The defense offered only one witness, Dr. Robert M. Dowd. Dr. Dowd, who at the time of the trial was currently on leave from the Department of Psychiatry of Tulane University Medical School. He was spending his leave as Assistant Professor of Family Health and Population Dynamics, studying psychiatric aspects of family planning. Dr. Dowd testified as an expert on the question of whether "Penelope, Issue No. 1" appealed predominately to a prurient interest in sex or nudity, and whether the magazine had any redeeming social value.

Dr. Dowd testified that in his opinion the magazine did not appeal predominately to a prurient sex interest in that it pictures "just female nudes," and is not sick or morbid.

He further testified that the magazine had redeeming social value in that it would tend to satisfy male curiosity as to female form, and in that aspect might be educational.

He further testified that in his opinion the magazine might be educational to adult females in that some females are curious about their bodies in comparison with the bodies of other females, and in this sense might also be therapeutic.

As stated above, the magazine "Penelope, Issue No. 1" was received in evidence. It was therefore before the court and jury at the trial level, it was before the Court of Criminal Appeals, and is now before us. From the outside of the front cover to the back of the back cover, the magazine consists of nude females in poses contrived to depict their genitals and breasts. The weight to be accorded Dr. Dowd's testimony was within the province of the jury, as was the weight to be accorded all of the evidence. From the verdict rendered, it must be inferred that the jury attached little or no weight to Dr. Dowd's testimony. The trial judge by his entry of the judgment pursuant to the verdict, and the Court of Criminal Appeals by its affirmance of the judgment, apparently found no reason to question the conclusions of the jury in this aspect. From our examination of "Penelope, Issue No. 1," we too are in hearty accord with the correctness of the jury verdict in this aspect.

We hold that Act 698, in all parts other than Section 374(16m) (Notice to be given) is clear and unambiguous. It sufficiently defines what is pornographic as to fully warn anyone of what is prohibited activity.

In *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, are new standards for guidance as to what constitutes obscenity

as a matter of law. They are, (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The standard set forth in *Memoirs v. Massachusetts,* 383 U.S. at 419, that the work be utterly without redeeming social value was repudiated, and superceded by (c) above. The court further held that patently lewd exhibition or representation of the genitals was a proper subject for regulation in an obscenity statute.

In *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed. 2d 446, the court held that the states have a legitimate interest in regulating commerce in obscene material in places of public accommodation, even though minors be excluded therefrom, and further, that it was not error "***to fail to require expert affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence**"

We come now to a consideration of whether Act No. 698 (Sections 374(16j) through 374(16o), is unconstitutional in toto because of the unconstitutionality of Section (16m), particularly in view of the recent decision rendered 5 January 1974 by a three judge Federal District Court for the Middle District of Alabama, Northern Division, in *United Artists Corporation, a Corp. v. E.L. Wright, Jr., individually and as Chief of Police, City of Montgomery, Alabama,* Civil Action No. 4208-N.

In said case E.L. Wright, Jr., as Chief of Police of Montgomery, Alabama, without any prior administrative or judicial proceeding, before a neutral party, served a written notice on an exhibitor in Montgomery, who proposed to show in his theater a moving picture entitled "Last Tango in Paris,"

stating that there was reasonable cause to believe that the exhibition of that film would constitute a violation of the Alabama laws regulating to obscenity.

The written notice advised the exhibitor that he could seek a declaratory judgment in the circuit court as to the obscenity vel non of the film, and further advised the exhibitor that "the exhibition of this film prior to obtaining the declaratory judgment might result in prosecution."

United Artists Corporation, the owner and distributor of the film, upon the exhibitor's declining to show the film after receipt of the notice, brought an action in which it alleged the unconstitutionality of Act No. 698 (Sections 374(j) - 160(o)) on its face, and as applied.

The three judge district court held that Section (374(16m) providing for notice was unconstitutional, and further that this section was inseparable from the remaining portions of the Act, and the Act should be considered as an indivisible whole, particularly since the Act failed to contain a separability clause.

The basis of the court's decision that Section (374(16m) (notice provision) was unconstitutional was that it, (a) constituted in effect a prior restraint, in that a threatened prosecution by a law enforcement officer "can constitute an all too effective prior restraint," (b) the notice section calls only for reasonable cause to believe the material is obscene on the part of the law enforcement officials, and thereafter the person receiving the warning must bring the declaratory action and carry the burden of proof, (c) the warning is for all intents and purposes a "final" act of censorship in that it would ordinarily effectively stop the showing of a film (or sale of questioned literature), and (d) there is in the section no provision for expediting judicial consideration, either at trial or on appeal, of the issue of obscenity, and therefore a final adjudication is subject to all of the delays incident to processing an ordinary civil action.

We are in accord with the conclusion reached that Section 374(m) is unconstitutional.

We are not in accord with the conclusion of the court that Section 374(m) is inseparable from the remaining portion of the Act, and therefore the entire Act is unconstitutional.

The decisions of federal courts other than the Supreme Court of the United States are not binding upon a state court of last resort. *Lokos v. State*, 278 Ala. 586, 179 So.2d 714; *Liddell v. State*, 287 Ala. 299, 251 So.2d 601.

In its opinion, the three judge court wrote:

> "Under Alabama law, the absence of a separability clause means that the statute is to be considered as an indivisible whole. San Ann Tobacco Co. v. Hamm, 283 Ala. 397, 406, 217 So. 2d 803 (1969)."

We consider this statement too general and too broad and a misconception of the doctrines of our cases on the subject. It is true that in *San Ann Tobacco Co.*, supra, this court wrote on rehearing as follows:

> "We recognize that a separability clause should be given effect, where possible, to save a legislative enactment. Allen v. Walker County, 281 Ala. 156, 199 So.2d 854; Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So.2d 810. (We called it a severability clause in Hall v. Underwood, 258 Ala. 392, 63 So. 2d 683 [16]).
>
> "Here, the absence of such a clause in Act No. 78, in connection with the fact that the part of the Act discussed in the original opinion was clearly of doubtful constitutionality, and as we stated – 'it is difficult to understand why the five words were

added by amendment to § 3 of the Act' *give evidentiary strength* to our conclusion that the Legislature intended for all the amendments in Act No. 78 to stand or fall together, and thus Act No. 78 has been stricken in its entiety." (Emphasis supplied.)

In other words, the absence of separability clause *gave evidentiary strength* to the conclusion arrived at in the original opinion that the legislature intended the amendments provided by Act No. 78 to stand or fall together, but was not conclusive thereof.

The rule of our cases is stated in *Wilkins v. Woolf*, 281 Ala. 693, 208 So.2d 74, as follows:

"Another guiding principle of paramount importance is that courts seek to sustain, and not strike down, the enactments of a coordinate department of government. Every legislative act is presumed to be constitutional and every intendment is in favor of its validity. Tucker v. State, 231 Ala. 350, 165 So. 249; Gray v. Johnson, supra. Although a statute may be invalid or unconstitutional in part, the part that is valid will be sustained where it can be separated from that part which is void. State ex rel. Farmer v. Haas, 239 Ala. 16, 194 So.395. If after the deletion of the invalid part, the remaining portions of an Act are complete within themselves, sensible, and capable of execution, the Act will stand notwithstanding its partial invalidity. Springer v. State ex rel. Williams, 229 Ala. 339, 157 So. 219.

"Certainly the existence of a severability clause in the Act itself cannot but strengthen this principle.'

In *State ex rel. Crumpton*, 177 Ala. 212 at 241, 59 So. 294, this court observed that the presence of a separability clause "serves only to render certain the legislative intent with

respect *to passage* of the valid parts**" See also *A. Bertolla & Sons v. State*, 247 Ala. 269, 24 So. 2d 23.

Here, the dominant purpose of Act 698 is to proscribe the sale or loaning for a monetary consideration to a person eighteen years of age or older of obscene, hard-core pornography. Apparently, the legislature sought by Section 374(16m) to give to a purveyor of obscene materials a warning, and even an opportunity to resolve the question of whether the material was obscene in a civil suit. In making this benign gesture, the legislature was mistaken in the constitutional aspects of its action.

However, without Section 374(16m), the remaining portions of Act 698 constitute an Act complete within itself, sensible, and capable of execution. We hold, therefore, that such remaining portions are not rendered invalid because of the invalidity of Section 374(16m).

The grounds asserted as error in support of the petition for certiorari are, (a) "that the provisions of Title 14, Section 374 as written and applied in the context of the case at bar [are] repugnant to Petitioner's rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States;" Ground (b) asserts that the rulings and treatment of some sixty-eight obscenity cases by the United States Supreme Court involving matters of "constitutional dimensions" as to both substance and procedure operate prospectively as to new and possible violations of Title 14, Section 374, and the newly announced standards to be employed; Ground (c) is similar to Ground (b) in that it asserts that the decisional standards announced in *Miller v. California*, supra, cannot be applied retrospectively to pending convictions not yet final as is the case at bar, "and accordingly the statute as applied is void as ex post facto legislation under Sections 1 and 9 of the United States Constitution."

What we have written we think disposes of ground (a) of the petition for certiorari.

Grounds (b) and (c) we think are disposed of by the holding in *Frank v. Mangum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969, to the effect that Sections 9 and 10 of the United States Constitution are directed to "legislative enactments" rather than judicial decisions.

Upon full consideration of the grounds asserted as error in support of the petition for the writ of certiorari, it is our conclusion that the Court of Criminal Appeals did not err in its memorandum judgment affirming the judgment here involved. Accordingly, the judgment of the Court of Criminal Appeals is due to be affirmed.

AFFIRMED.

Merrill, Coleman, Bloodworth, McCall, and Faulkner, JJ., concur.

Heflin, C.J., and Maddox, J., concur specially.

Jones, J., dissents.

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HEFLIN, CHIEF JUSTICE (Concurring):

I concur in the result reached by the majority opinion in this case, and I am in basic agreement as to the rationale employed. There are some points, however, which, I feel, need to be clarified.

First, I think that there is no doubt that the statute involved, Title 14, Sections 374(16j)-374(16o), Alabama Code of 1940, as amended (Recompiled 1958) (Supp 1971), meets the constitutional requirements of specificity established by

the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). This statute compares favorably with the statutes from Oregon and Hawaii which the Supreme Court in *Miller* suggested would pass constitutional muster.

Second, while I do not agree with the generalized treatment given the issue of retrospectivity by the majority opinion, I don't think there is any problem of retrospective application of *Miller* standards in this case. The statute as written is as specific as *Miller* requires and was when petitioner was indicted and convicted. Furthermore, the jury applied the old "utterly" standard and not the current "serious" standard of *Miller*. An independent examination of the evidence demonstrates that the jury's determination that the matter was utterly without redeeming social value was correct. If a defendant has had the benefit of the "utterly" test, then it is inescapable that he has had benefit of the "serious" test, because any matter which is utterly without value could have no serious value. See *Pierce v. State*, ___ Ala. ____, _____ So.2d ____ (Ms. 483, May 9, 1974).

I feel, however, that under some circumstances ex post facto considerations are applicable to judicial decisions, especially where judicial engraftments favorable to the prosecution are added to a statute. Since there is a difference of opinion on the issue of retrospective application of *Miller* to conduct which occurred prior to *Miller's* issuance, not only among members of this court but among courts around the country, see *Chobot v. Circuit Court for Milwaukee County*, 61 Wis. 2d 354, 212 N.W. 2d 690 (1973) (limiting construction may be applied to punish conduct occurring prior to the construction); *State v. Welke*, ___ Minn. ___, _____ N.W.2d _____, 14 Crim. L. Rptr. 2498 (1974) (construction in case at bar does not afford requisite notice with respect to sale four years ago), I feel constrained to elaborate upon my views of this issue.

The difficulty arises, in my view, because of two factors: (1) The Supreme Court limits the scope of state regulation of

obscenity to "sexual conduct specifically described" but apparently invites courts to cure defects in statutes by judicial construction, and (2) the court eliminates the "utterly without redeeming social value" test which was very difficult to meet, and replaces it with the "without serious literary, artistic, political, or scientific value" test which is a standard less difficult for the prosecution to meet. These two developments must be considered independently if a clear understanding of the potential ex post facto problems of *Miller* is to be had.

Assume first that *Miller* had been issued without any mention of judicial construction supplying the required specificity. As of June 21, 1973, the constititutional rule would be that for a statute to be valid (and a prosecution under it to be upheld) the statute would have to have defined obscenity in terms of sexual conduct specifically described. From that day forth any court reviewing an obscenity conviction would begin by examining the statute under which the defendant was tried. If the statute as written was specific at the time the alleged violation occurred then the conviction could be affirmed, but if not, it could not be. There is no question of retrospective application – the statute either was specific or it was not, and the decision would turn on that point.

In *Miller*, however, the court went a step further. The decision indicates that the statute as written or construed must be limited as mentioned. If, prior to *Miller*, the statute had been construed to be limited to "sexual conduct" and that conduct specifically described in the opinions so construing the statute, then the defect of vagueness would have been cured by prior judicial construction and the defendant could not complain that he did not have notice of the activity proscribed. In such instance a defendant's conviction under the previously judicially construed statute would be valid. *Pierce v. State*, supra (statute limited by previous construction); *United States v. Thevis*, 484 F.2d

1149 (5th Cir. 1963) (Title 18 U.S.C.A., §1462 (1970) "has been the subject of much explication in Supreme Court opinions," thus the court sustained convictions on this issue); *Rhodes v. State*, 283 So.2d 351 (Fla. 1973) (conviction upheld because cases since 1969 and before *Miller* had construed obscenity statute).

But what if there had been no prior construction of the statute, and as written, it was not as specific as *Miller* required? Clearly, the statute would fail to pass the vagueness muster and the conviction would have to be reversed. *State v. Welke*, supra.

But the court in *Miller* indicated that the judicial construction could be supplied subsequent to the issuance of *Miller* itself. Does this mean that in deciding pending cases, a court can affirm a conviction by construing the statute in the very case before it as being specific enough to meet the *Miller* requirement? How can it be said that the defendant had noticed that his actions were criminal when the alleged crime was committed if the court only clarifies what the statute means now – a year or two after the allegedly criminal acts.

In construing a statute the court is essentially performing a legislative act. This is especially true in instances where the court is curing some constitutional defect by construction. See *Art Theater Guild, Inc. v. State*, ___ Tenn. ___, ___ S.W.2d ___ 14 Crim. L. Rptr. 2497 (Tenn. Feb. 19, 1974) ("The function of this Court is to interpret a statute . . . and [it] cannot usurp the prerogatives of the legislature by supplying essential elements to a statute which have been omitted . . . "). Thus, even though as a general rule ex post facto principles may not apply to court decisions, clearly in a case like that described above, ex post facto principles should be considered. *See United States v. Lang*, 361 F.Supp. 380 (C.D. Cal. 1973) (Application of *Miller* standards in pending case is "the functional equivalent of an ex post facto application of the law."). In a case where there is no prior

authoritative construction, the courts' adoption of a *Miller* type construction can only operate prospectively. That is, from the date the court adopts a specific construction properly limiting the statute, all potential wrongdoers will have notice as to what activity is outside the scope of the statute. The statute will be, by construction as of the date of the opinion, as specific as *Miller* requires. But to attempt to have the construction relate back one or two years or more in order to affirm pending cases would clearly operate as a denial of due purpose.

In *Papp v. State*, 281 So.2d 600 (Fla. Crim. App. 1973), the Florida District Court of Appeals, Fourth District had this precise issue before it. That court stated:

> "The [Florida obscenity] statute is susceptible of judicial construction by which its scope may be limited to 'obscene material' as defined in Miller v. California, supra. It is our view, however, that for this court to so construe the statute and at the same time apply it to Mr. Papp's conduct which was brought into question in the courts of this state before the statute had been thus limited by judicial construction, would amount to a denial to Papp of due process of law, because at the time of his alleged offense [1969] neither the statute nor judicial construction thereof gave adequate notice of the conduct sought to be proscribed."

See also *Stroud v. State*, ____ Ind. ___, 300 N.E. 2d 100 (1973).

The second aspect of the *Miller* case mentioned above which tends to cause confusion as far as ex post principles are concerned is the new social value norm. The *Miller* decision lightens the burden the state must carry in proving the matter before the court is obscene since it is no longer necessary to meet the "utterly without social value" test but instead the

state need only prove the matter has no "serious literary, artistic, etc., value." Hence, in the future prosecutors should have a less burdensome burden of proof in this connection.

In pending cases, however, there should be little doubt but that the heavier burden must have been carried at trial. In *United States v. Thevis,* supra, the defendants had been convicted under 18 U.S.C. §6, 1462 (1970) for transporting obscene matter by common carriers in interstate commerce. The trial court had found the material to be obscene under the three-pronged *Roth-Memoirs* formulation. While the appeal to the Fifth Circuit was pending the *Miller* decision was issued. The appellant in *Thevis* argued that the *Miller* tests replaced the *Roth-Memoirs* tests but that the *Miller* tests could not be given a retroactive effect. The court stated that out of an abundance of caution it would apply both the *Roth-Memoirs* and the *Miller* tests "with the appellants to receive the benefit of the most favorable standard." The effect of such application was that the Fifth Circuit did not apply the *Miller* test of social value retroactively since the *Roth-Memoirs* standard was more favorable to the defendant.

The Supreme Court of Florida handled this matter with the following language:

> "On the matter of standards of obscenity, the U.S. Supreme Court has now afforded a sensible test and guidelines in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed. 2d 419 (1973) and Paris Adult Theatre I. v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed. 2d 446 (1973), decided on June 21, 1974. The new test will no doubt prove more effective in future infractions of §847.011 and of the new Fla. Stat. Ch. 73-120. We cannot, in our view, however, by reason of ex post facto principles apply new standards in the now-judicially-approved "new test" of obscenity to earlier offenses in determining the sufficiency of the statutory language to warn the average person of

common intelligence as to what constitutes the prohibited offense. This is particularly true of 'c' of the test in Miller as to 'literary, etc. value'. It may or may not be true of (a) and (b) in view of our statutory language and its construction as it may have been published as notice to an offender on the date of the offense in question.

"Sub judice the test set forth in these latest U.S. judicial holdings with respect to 'c' ('literary value') as to what now constitutes obscenity was not available on May 5, 1971, as amplification of the notice to appellant of the proscribed conduct; such as modification of the old test in the new holdings cannot now be echoed to the date of the earlier offense. The 'old test' (Memoirs v. Mass. 383 U.S. 413, 419, 86 S. Ct. 975, 978, 16 L.Ed. 2d 1 (1966)) that the allegedly obscene matter be 'utterly without redeeming social value.' must apply in such instance, for such was the test upon which defendant was on notice of the date (May 5, 1971) of the alleged violation." *Rhodes v. State*, supra.

The Florida Court went on to hold that the "utterly" test had been properly applied below, and furthermore, that judicial construction of the Florida obscenity statute since 1969 but before *Miller* supplied any needed particularity in the statute.

Another clear expression of the principles involved in applying *Miller* is found in *United States v. Lang*, supra:

"The newly formulated Miller test eases the prosecution's burden, and enhances the likelihood of successful prosecution. The new test simply requires that the prosecution show, inter alia, that 'the work, taken as a whole, lacks *serious* literary, artistic, political or scientific value.' Miller, supra, – U.S. at

> —, 93 S.Ct. at 2615 (emphasis added). In short, the Court's new test substantially changes the law of obscenity, and as a general proposition now makes it easier to convict the defendants. Therefore, to prosecute defendants under the judicially devised Miller definition of obscenity and to instruct the jury on it would, without fig leaves, be the functional equivalent of ex post facto application of the law. This the due process clause forbids. Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L.Ed. 2d 894 (1964). Moreover, to apply retroactively the judicial construction now placed on § 1461 would further deprive defendants of due process by having denied them fair warning that their acts, when committed, constituted a crime."

In summary, it seems clear that, for pending prosecutions, *Miller* requires this court to examine the statute and prior cases under it to determine whether the defendant was given proper notice of what constituted the crime. Moreover, it is abundantly clear that the only social value norm which can constitutionally be applied in cases pending at the time *Miller* was issued is the more stringent "utterly" test. Thus the courts must examine convictions obtained prior to *Miller* in light of these potential ex post facto problems.

Since the statute here applicable meets the *Miller* requirements of specificity and since the defendant was given the benefit of the "utterly" test at trial and upon review before this court there is no reversible error in the record on these issues.

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MADDOX, JUSTICE (Concurring specially)

I concur wholeheartedly in the opinion with the exception of that part which holds Section 4 of Act 698, Acts, 1969 [Title 14, Section 374(m)] is unconstitutional. Section 4 of Act 698 provides:

> "(a) No prosecution may be commenced against any person for violating Sections 2 and 3 of this Act unless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this Act, and the accused has, after receiving such notice violated this Act.
>
> "(b) The written notice provided for in paragraph (a) of this Section 4 may be given by only the following officials; the State Attorney General and any Assistant Attorney General; the district attorney, county solicitor, their assistants and deputies, or any person whose office and duty is to prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the Department of Public Safety.
>
> "(c) Any person receiving such written notice provided for in paragraph (a) of this Section 4 shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this Act.

I realize that a three-judge District Court has held that not only Section 4, but Act 698, in its entirety, is unconstitutional, but as Justice Harwood points out, that

decision is not binding upon us. In fact, *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419 (1973), reaffirmed the principle that it is the function of the states to regulate obscenity and that this is " . . . a power reserved to them under the Constitution, a power which they have . . . exercised continuously from before the adoption of the First Amendment to this day."

Under the guidance of *Miller,* I believe the Federal District Court is incorrect about Section 4 (the notice provision). The authority which the Federal District Court cites is all pre-*Miller.* In *Miller,* the majority of the Supreme Court of the United States pointed out:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. *We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.* See Roth v. United States, supra, 354 U.S., at 491-492, 77 S.Ct. at 1312-1313 (1957). Cf. Ginsberg v. New York, supra, 390 U.S. at 643, 88 S.Ct. at 1282 (1969)." [Emphasis added.]

As I read this admonition in *Miller,* a majority of the Supreme Court seems to thing a *notice* to peddlers of obscenity that they *could suffer prosecution* is not constitutionally impermissible.

As a matter of fact, in *Gable v. Jenkins,* 309 F. Supp. 998 (N.D. Ga.1970), aff'd per curiam, 397 U.S. 592, 90 S.Ct.1351, 25 L.Ed. 2d 595 (1970), Georgia Code, § 26-2101, which is similar to Act 698 in its definition of obscene material, was upheld as being constitutional by the

Supreme Court of the United States. While the Court there held that a prior adversary hearing is constitutionally necessary before *seizure* of obscene material can be made, the Court nevertheless suggested a procedure which could be followed, which procedure closely follows the "notice" provision of Act 698. The Court pointed out (309 F. Supp. at page 1001):

> "However, as to the necessity of the prior adversary hearing, this goes merely to the competency of the evidence in an obscenity prosecution and would not bar a prosecution based on other legally obtained evidence. Matter seized illegally, i.e., without a hearing, must be returned. In Marcus v. Search Warrant of Property, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed. 2d 1127 (1961), the evil was that the hearing as to the obscene nature of the material was held after seizure; thereby, the Supreme Court concluded that the procedure employed was unconstitutional. There is proper procedure existing in the Georgia law that can achieve constitutional standards, i.e., a prior adversary judicial proceeding before the seizure of the allegedly obscene items.[3] Accordingly, Georgia Code 26-2101 is not unconstitutional in that it does not establish a prior judicial hearing within itself.
>
> "3. As example, the following are presented: When a search warrant is applied for to seize the alleged obscene materials, the person possessing the same could be given notice of the intent to apply for the search warrant, and be given an opportunity to be present at such time, and present evidence in opposition to the issuance of the search warrant. Or an order to show cause why the alleged obscene film is not obscene could be served on the possessor, or a petition to have the film declared contraband, and subject to destruction could be served on the possessor."

The obscene material in this case was purchased *after* the seller had been warned that the material was considered obscene. It was not seized under a warrant or incident to an arrest.

From a policy standpoint, the notice provision of Act 698 puts an additional requirement on the prosecution– to give *written notice* to a seller advising him that his material is considered obscene. This notice is required *before* a prosecution can be commenced.

Most violators of the law are not favored with a warning before a prosecution can be commenced. Since I do not believe that a prior judicial determination that material is obscene must be held before a prosecution can be commenced, I cannot agree with the majority on this point.

I think the majority here and the Federal District Court have both misinterpreted the purpose of the notice provision. I believe the legislative purpose was probably designed to notify book dealers that a book or magazine he was selling was obscene. He could not be prosecuted until he was *notified.* Many citizens might object to the state policy which requires that a seller of obscene material should be forewarned, but the Legislature has decided differently. Under *Miller,* the regulation of obscenity, within the guidelines there announced, is one for the individual state legislatures or state judges interpreting state law. At least, that is what I think *Miller* says.

I believe these notice provisions are beneficial to a potential defendant in an obscenity case. In *Hawkins v. State,* 124 Ga. App. 53, 183 S.E. 2d 239 (1971), the defendant considered the *notice provisions* to be beneficial. Hawkins was being prosecuted for violating one of Georgia's obscenity statutes. He claimed that the "notice" provision of the subsequent law (which dealt only with minors, but which

contained a notice provision like Section 4 of Act 698) required that he be notified in writing before the prosecution could be commenced. The court did not rule in Hawkins' favor, but it seems obvious that to require that the prosecutor notify a potential defendant that what he is doing is considered illegal *before* the state can prosecute is beneficial to the defendant.

There is another reason why I think the notice provision is not unconstitutional. The fact that a crime is "knowingly" committed is always an important consideration. It is conceivable that a dealer might not be aware of each and everything which is contained in the books or magazines he sells. I think that is the reason the Legislature put the notice provision in the statute. *Miller* sets up the latest guidelines for prosecution of obscenity cases. I do not believe that the State must establish in an adversary hearing the obscenity vel non of every film, book, magazine, or other material *before* a prosecution can be commenced. Consequently, I disagree that Section 4 is unconstitutional.

## APPENDIX B

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### Constitutional and Statutory Provisions

1. The pertinent provisions of the First Amendment are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

2. The pertinent provisions of the Fifth Amendment are:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

3. The pertinent provisions of the Sixth Amendment are:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . "

4. The provisions of the Eighth Amendment are:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. The pertinent provisions of the Fourteenth Amendment are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

6. The pertinent provisions of Article I, §9 are:

> "***No ...ex post facto Law shall be passed.**"

7. The pertinent provisions of Title 14, Section 374, Code of Alabama are:

(a) Section 374 (3):

> " 'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest."

(b) Section 374(4):

> Importation, sale or possession of obscene printed or written matter; penalties. – [1] Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, or in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

[2] Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

(c) Section 374(16j), as described by Supreme Court of Alabama:

. . . contains specific definitions of words used in the Act, such as "nudity," "sexual conduct," "sado-masochistic abuse," "hard-core pornography," "obscene," etc. "Obscene" is defined as a description or representation in any form of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it, (1) predominately appeals to the prurient, shameful, or morbid interest, and (2) is patently offensive to prevailing or contemporary standards in the adult community as a whole with respect to what is suitable material, and (3) is utterly without redeeming social value or importance.

(d) Section 374(16k), as described by the Supreme Court of Alabama:

. . . makes the sale or loan to a person eighteen years of age or over, of any picture, photograph, drawing, magazine, maphlet, etc., of a person, or portion of the human body, which depicts nudity, sexual conduct, or sado-masochistic abuse and which is obscene or represents hard-core pornography.

(e) Section 374(16m):

(a) No prosecution may be commenced against any person for violating sections 374(16k) and 374(16l) of this title unless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this chapter, and the accused has, after receiving such notice violated this chapter.

(b) The written notice provided for in paragraph (a) of this section 374(16m) may be given by only the following officials; the state attorney general and any assistant attorney general; the district attorney, county solicitor, their assistants and deputies, or any person whose office and duty is to prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the department of public safety.

(c) Any person receiving such written notice provided for in paragraph (a) of this section 374 (16m) shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this chapter. (1969, p. 1254, §4, appvd. Sept. 10, 1969.)